

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of The Barberton Rescue
Mission, Inc., Christian Brotherhood
Newsletter, a/k/a CBN, and Christian
Brotherhood Newsletter, Inc., a/k/a CBN,
Inc.

**ORDER REGARDING MOTION TO
COMPEL**

The above matter is pending before Administrative Law Judge George A. Beck pursuant to a Notice of and Order for Hearing, Notice of Prehearing Conference, and Statement of Charges dated October 18, 2001. The Department is represented by Jennifer Kenney, Assistant Attorney General, NCL Tower, Suite 1200, 445 Minnesota Street, St. Paul, Minnesota 55101-2130. The Respondents are represented by Thomas F. Pursell, Attorney at Law, Lindquist & Vennum, P.L.L.P., 444 Cedar Street, Suite 1700, St. Paul, Minnesota 55101; Jeffrey J. McNaught, Attorney at Law, Lindquist & Vennum, P.L.L.P., 4200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402; and Barry S. Brown, Attorney at Law, Suite 203, 1050 North Point Road, Baltimore, MD 21224.

On May 30, 2002, the Department of Commerce filed a Motion to Compel. Judge Beck thereafter notified counsel that the undersigned Administrative Law Judge would handle the discovery matter. After receipt of the Respondents' Memorandum in Opposition to the Motion and the Department's Reply Memorandum, the record with respect to the motion closed on June 26, 2002.

Based upon the record in this matter, and for the reasons set forth in the attached Memorandum, IT IS HEREBY ORDERED as follows:

1. The Department's Motion to Compel is GRANTED in part and DENIED in part.
2. The Respondents shall respond to the Department's Interrogatories and Request for Production of Documents by August 9, 2002, as follows:
 - a. The Respondents shall respond in full to Interrogatory Nos. 1, 2-7, 12-15, 16-19, and Document Request No. 10.
 - b. The Respondents shall supplement their responses to Interrogatory Nos. 9, 10, 11, and 20 and Document Request Nos. 9 and 12 to the extent that they are now aware of additional information and/or documents responsive to those requests.

- c. The Respondents shall respond in full to Document Request Nos. 1-3, 6-8, 11 and 13, with the exception of medical records received from providers and verification of Christian faith/eligibility forms.
 - d. The Respondents shall respond to Document Request No. 4 by providing copies of any documents relating to marketing or sales information, solicitations, or agreements provided to employees, agents, or other persons working on behalf of the Respondents who have contacted any Minnesota residents on behalf of the Respondents.
- 2. The Respondents shall provide a log referencing all documents they have not produced because they contend that the document is privileged or otherwise protected from disclosure. The log shall briefly describe the document (including the date, number of pages, name, address, and employment title of author or preparer and the addressee or others receiving a copy), state the subject matter of the document (including identification of meetings or conversations referenced in the document), and specify the reason for withholding the document, including a statement of the basis for the claim of privilege or other ground for non-disclosure.
- 3. The Department will be afforded an additional period of 30 days from the date that the Respondents provide their additional discovery responses to notice and take depositions of individuals who are identified as a result of additional information and/or documents provided by the Respondents. Counsel shall contact Judge Beck to discuss any other modifications that they feel are necessary in the scheduling order that was approved on March 6, 2002.
- 4. The information gained through discovery in this case is subject to the following Protective Order:
 - a. The Department and its employees, investigators and counsel shall make no use of any information gained through discovery in this case other than such use as is necessary to prepare, try and decide the issues in this case. Any other disclosure, publication, or dissemination is prohibited in the absence of further order of the Administrative Law Judge or a court of law.
 - b. This Protective Order applies to all medical records, documents reflecting medical treatment and diagnoses, and information obtained through discovery which is claimed to be confidential under the First Amendment, and applies to any document in this proceeding which refers to or restates information gained through discovery. The Respondents shall mark all such material with the word "Confidential."

- c. The Department shall retain all confidential information gained through discovery in a separate file that is not generally accessible except to its counsel and that is clearly identified as containing confidential data.
- d. Before any confidential data is revealed to any person by the Department's counsel, that person shall be advised of the terms of this Order.
- e. The names of all persons who are given access to confidential data for the purposes set out in paragraph (a) shall be entered on a roster retained by the Department's counsel.
- f. When a final decision is reached in this case, all confidential information and copies thereof and a copy of the Commissioner's roster shall be returned to the party that produced them.

Dated: July 26, 2002.

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

1. Background

Based upon the materials filed in connection with the pending discovery motion, it appears that the underlying facts in this case are as follows. The Respondents distribute a publication called "The Christian Brotherhood Newsletter" ("CBN"). Individuals who are Christians and meet certain criteria (do not use alcohol, tobacco, or illegal drugs, attend church regularly, and abstain from a homosexual lifestyle) are eligible to become subscribers of the Christian Brotherhood Newsletter ("CBN").¹ The informational materials sent out by the CBN state that the CBN "is not insurance" but rather "is a Christian ministry which publishes a monthly newsletter where subscribers voluntarily choose to share each other's medical expenses in an effort to help fulfill the scriptural admonition to 'bear ye one another's burdens.'"² Subscribers provide a family health history on a "pre-qualification form" and enroll in the "gold," "silver," or "bronze" programs.³ For those enrolled in the gold program, one person gives \$135 per month, a family of two gives \$270 per month, and a family of three or more gives \$405 per month, and qualifying medical "needs" over \$500 are submitted to be shared with other subscribers.⁴ For those enrolled in the silver program, one person gives \$67.50 per month, a family of two gives \$135 per month, and a family of three or more gives

¹ "Fact Pak" at DOC00150, 151; Spriggs Affidavit, Exhibit A at 3.

² CBN "Fact Pak," at DOC00147, 149 attached as Exhibit C to the Affidavit of Thomas F. Pursell.

³ "Fact Pak" at DOC00151.

⁴ "Fact Pak" at DOC00151, 153.

\$202.50 per month, and qualifying medical “needs” over \$1,000 are submitted to be shared with other subscribers.⁵ For those enrolled in the bronze program, one person gives \$33.75 per month, a family of two gives \$67.50 per month, and a family of three or more gives \$101.25 per month, and qualifying medical “needs” over \$5,000 are submitted to be shared with other subscribers.⁶

The CBN “Fact Pak” consists of Informational materials provided by CBN to potential subscribers. The “Fact Pak” informs potential subscribers that they “will be notified every month of a fellow Christian who has medical bills” and will thereafter be asked “to pray for them and send them a card or letter of encouragement” and “send a designated gift amount to the Christian Brotherhood Newsletter to help pay the subscriber’s bills. Then should you ever have a need, those subscribers would pray for you and be encouraged to send checks to pay your medical need.”⁷ According to the “Fact Pak, subscribers “send their checks each month in support of a subscriber’s need directly to the Christian Brotherhood Newsletter Subscriber Escrow Account.”⁸ The CBN website indicates that subscribers with qualifying medical needs go through five steps to get help from other subscribers: (1) the subscriber tells his or her medical provider that the subscriber is a self-pay patient but has a group of Christians and churches that will help pay his or her bills; (2) subscribers list the bills on a “Need Processing Form” which is sent to the Newsletter; (3) the Newsletter reviews the bills for billing errors, checks whether the illness was preexisting, and determines whether the illness qualifies to be published in the Newsletter; (4) the need is placed in line to be published in the Newsletter; and (5) the subscriber receives money and uses it to pay medical providers.⁹ The CBN website thus indicates that bills are “published in the newsletter.” The website also states that subscribers receive a “yellow card” each month indicating “[t]he name of a fellow Christian subscriber who has a medical need,” “[a] short description of the illness,” “[t]he total amount of the bills,” and “[t]he amount your family should send based on the number of units in your subscription.”¹⁰ However, the Affidavit of Joy Spriggs (the supervisor of the CBN’s Needs Processing and Needs Reduction group) filed by the Respondents in support of their memorandum in opposition to the motion provides a differing view of whether the identities of subscribers are revealed:

When a subscriber’s needs are “published,” that means my group has determined that the need meets the criteria for financial disbursement. “Publication” does not mean publication in the Newsletter. Neither these needs nor the identities of the persons submitting them are put into the Newsletter or otherwise made public. The only people whose pictures and stories appear in the Newsletter are people who have given prior permission. Some people whose needs do not qualify are put on our prayer list and often receive contributions from other subscribers. Such

⁵ “Fact Pak” at DOC00151, 153-54.

⁶ “Fact Pak” at DOC00151, 154.

⁷ “Fact Pak” at DOC00149.

⁸ “Fact Pak” at DOC00148.

⁹ Spriggs Affidavit, Ex. A at 1-2; “Fact Pak” at DOC00153.

¹⁰ Spriggs Affidavit, Ex. A at 1.

contributions are above and beyond their regular monthly subscriber contribution.¹¹

Rev. Howard Russell, Chairman of the Board and Executive Director of CBN, states in an affidavit filed by the Respondents that CBN had, as of June 21, 2002, "returned approximately \$900,000.00 more to Minnesota subscribers than CBN has received from those subscribers."¹²

The CBN has operated by court-appointed receiver since the spring of 2001.¹³ In her affidavit, Ms. Spriggs stated that the receivership was prompted by management practices that came to light during the previous management's tenure, and that, during an ensuing struggle for control, "some of the former managers and/or contractors took an unknown but significant number of CBN's documents with them." Ms. Spriggs indicates that the organization does not have a "complete catalogue of marketing materials or past issues of the Newsletter."¹⁴

In the Notice of and Order for Hearing, Notice of Prehearing Conference, and Statement of Charges filed in this matter, the Department alleges that the Respondents are transacting insurance business in Minnesota and entering into contracts of insurance with Minnesota residents by indemnifying their subscribers for their medical bills through monthly "gifts" or premiums collected from other subscribers. The Department contends that the Respondents' product meets the definition of "insurance" contained in Minn. Stat. § 60A.02, subd. 3(a). That provision specifies that insurance is "any agreement whereby one party, for a consideration, undertakes to indemnify another to a specified amount against loss or damage for specified causes, or to do some act of value to the assured in case of such loss or damage." The Department asserts that, in exchange for a monthly "gift" or premium, the Respondents publish their subscribers' "needs" in their newsletter and collect the "gifts" or premiums to pass on to the needy subscriber to pay for medical bills incurred when the subscriber sustains a loss from injury or illness. The Department argues that the Respondents have transacted the business of insurance, entered into contracts of insurance, or otherwise acted as an insurer and/or as an insurance agent by offering and selling insurance, writing policies of insurance, and collecting premiums within the State of Minnesota without a proper license or Certificate of Authority as required by relevant state law. The Department alleges that the states of South Dakota, Washington, Pennsylvania, Delaware, and Maryland have issued cease and desist orders against the Respondents or otherwise penalized the Respondents for soliciting and transacting the business of insurance in their states without a license.

The Minnesota Department of Commerce issued a cease and desist order based upon the allegations set forth in the Notice of Hearing on June 20, 2001, and has initiated the present contested case action to consider whether that order should be

¹¹ Spriggs Affidavit at ¶¶ 1 and 3, and attached Ex. A.

¹² *Id.* at ¶3.

¹³ Spriggs Affidavit at ¶2; Pursell Affidavit, Ex. E (Operating Receiver's First Report).

¹⁴ Spriggs Affidavit at ¶2.

vacated, modified, or made permanent. Under an agreement between the Department and the Respondents, the Respondents have agreed that they will not solicit or accept any new business in Minnesota pending the final resolution of this matter. The agreement permits the Respondents to continue to collect and distribute money to existing Minnesota members.

The interrogatories and document requests at issue in this Motion to Compel were served on the Respondents on January 31, 2002. After the Respondents' counsel informed the Department that the Respondents needed additional time to respond, the Department agreed to a 60-day extension of the entire litigation schedule, so that the discovery responses were due on April 30th, 2002. On April 29, 2002, one of the attorneys for the Respondents called counsel for the Department and stated that he had 4,000 pages of Bate-stamped documents to produce. He indicated that any documents withheld would be disclosed on an accompanying privilege log. On April 30, 2002, the Respondents produced their responses to the Department's interrogatories and document requests. The Respondents produced approximately 500 pages of documents that were not Bate-stamped at that time. The Respondents did not provide a privilege log for the approximately 3,500 pages of documents they had withheld in reliance upon various privileges.

By letter to Respondents' counsel dated May 13, 2002, the Department outlined the deficiencies it believed existed in the Respondents' discovery responses, requested a privilege log, and requested that the parties meet regarding the discovery issues. By letter dated May 16, 2002, counsel for the Respondents indicated that they would provide a formal response to the Department's objections including a privilege log by May 24, 2002. On May 24, counsel for the Respondents faxed a letter to the Department indicating that the response and privilege log would not be available until June 10. On May 28, 2002, the Department informed the Respondents that it would be filing the present motion to compel.

On May 30, 2002, the Department filed a Motion to Compel the Respondents to respond to certain of its interrogatories and document requests. In its motion, the Department contended that the Respondents had completely failed to respond in any meaningful way to the vast majority of the Department's interrogatories and document requests. The Department therefore requested that the Administrative Law Judge order the Respondents to produce the requested information and documents.

After the Motion to Compel was filed on May 30, 2002, the Respondents indicated in a letter dated June 6, 2002, that the Department's request for a hearing on the motion was premature because the Respondents had not yet been able to complete the privilege log detailing the privilege claims and because the Respondents had no objection to a mutual extension of time to notice non-expert depositions. By letter dated June 7, 2002, Judge Beck informed the parties that he assumed that the privilege log would be provided on June 10, the Respondents' reply to the Motion to Compel would be due on June 14, 2002, and the undersigned Administrative Law Judge would handle the discovery matter while he was on vacation. By letter dated June 10, the Department

reiterated that it did not believe that there was any reason to grant the Respondents an extension of the prehearing schedule.

By letter dated June 11, 2002, the Department notified the Administrative Law Judge that it had received a portion of the Respondents' privilege log on June 10 (encompassing 1,254 documents of the approximately 3,500 to 4,500 documents withheld by the Respondents). The Department asserted that there was no legal or factual support for the Respondents' reliance on the claimed privileges and provided further argument concerning the motion. By letter dated June 12, 2002, the Respondents verified that they had provided a 120-page privilege log that pertained to approximately 1,200 pages of documents. The Respondents asserted that the remaining, unlogged documents fell into the same categories as those that were included in the log and indicated that the Department had agreed that "another several hundred pages of essentially duplicative privilege log entries would not further anyone's analysis of the issues." In light of the burdens associated with producing the voluminous log, the overseas vacation of Respondents' Baltimore counsel, the unavailability of the Respondents' executive director, and the importance of the constitutional issues involved in the discovery dispute, the Respondents requested a one-week extension of time to respond to the Motion to Compel. Respondents also requested that an evidentiary hearing be held concerning the motion to discuss the religious issues that have been raised. By letter dated June 13, 2002, the Department confirmed that it was willing to proceed with the Motion to Compel without the complete privilege log and opposed the Respondents' request for an extension of time. By letter dated June 13, 2002, the Administrative Law Judge granted the Respondents' request for a one-week extension of time to June 21, 2002, to serve and file their response in opposition to the motion for good cause shown.

After receiving the Respondents' response in opposition to the motion on June 21 and the Department's reply brief on June 24, the Administrative Law Judge notified counsel by letter dated June 26 that she did not intend to hear oral argument or testimonial evidence concerning the Motion to Compel because it did not appear that a hearing on the motion was necessary to the development of a full and complete record on which a proper decision could be made. The parties were informed that they were expected to comply to the extent possible with the July 1 deadline previously set for noticing non-expert depositions and that, should the Motion to Compel be granted in whole or part, it would be considered whether it was appropriate to permit the Department more time to notice and take depositions of individuals who were identified as a result of any additional information the Respondents were compelled to provide.

2. Legal Standard

The rules of the Office of Administrative Hearings govern the availability of prehearing discovery in contested case proceedings. The OAH rules state that "[a]ny means of discovery available pursuant to the Rules of Civil Procedure of the District Court of Minnesota is allowed" in contested case proceedings.¹⁵ Thus, parties to

¹⁵ Minn. R. 1400.6700, subp. 2.

contested case proceedings may seek discovery using the methods authorized under the Rules of Civil Procedure, such as depositions, written interrogatories, document requests, physical and mental examinations, and requests for admissions.¹⁶ However, unlike the procedure applicable in judicial proceedings, the OAH rules governing contested case proceedings place the burden of demonstrating that the requested discovery is proper on the party seeking disclosure rather than on the party resisting discovery. Thus, the party seeking discovery must show in the context of a motion to compel that the discovery is needed for the proper presentation of the party's case, the discovery is not sought for purposes of delay, and the issues or amounts in controversy are of sufficient significance to warrant the discovery. The party resisting discovery may raise any objections that are available under the Minnesota Rules of Civil Procedure, including lack of relevancy and privilege.¹⁷

Rule 26.02 of the Minnesota Rules of Civil Procedure permits discovery regarding any unprivileged matter that is "relevant to the subject matter involved in the pending action," including information relating to the "claim or defense of the party seeking discovery or to the claim or defense of any other party." Materials that may be used in impeachment of witnesses may also be discovered as relevant information.¹⁸ It is well accepted that the discovery rules are given "broad and liberal treatment" in order to ensure that litigants have complete access to the facts prior to trial and thereby avoid surprises at the ultimate hearing or trial.¹⁹ Administrative Law Judges at the OAH "have traditionally been liberal in granting discovery when the request is not used to oppress the opposing party in cases involving limited issues or amounts."²⁰

The definition of relevancy in the discovery context has been broadly construed to include any matter "that bears on" an issue in the case or any matter "that reasonably could lead to other matter that could bear on any issue that is or may be in the case."²¹ As a general matter, evidence is deemed to be relevant if it would logically tend to prove or disprove a material fact in issue.²² In summary, "matters sought to be discovered in administrative law settings will be considered relevant if the information requested has a logical relationship to the resolution of a claim or defense in the contested case proceeding, is calculated to lead to such information, or is sought for purposes of impeachment."²³ The definition of "relevancy" for discovery purposes is not limited by the definition of "relevancy" for evidentiary purposes. Thus, information that is deemed relevant at the discovery stage may not necessarily be admissible evidence at the

¹⁶ Minn. R. Civ. P. 26.01.

¹⁷ Minn. R. 1400.6700, subp. 2.

¹⁸ See, e.g., *Boldt v. Sanders*, 261 Minn. 160, 111 N.W.2d 225 (1961).

¹⁹ See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 507 (1947), quoted with approval in *Jeppesen v. Swanson*, 243 Minn. 547, 551, 68 N.W.2d 649, 651 (1955); *Baskerville v. Baskerville*, 75 N.W.2d 762, 769 (1956).

²⁰ G. Beck, M. Gossman & L. Nehl-Trueeman, *Minnesota Administrative Procedure*, § 8.5.2 at 135 (1998).

²¹ *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

²² *Boland v. Morrill*, 270 Minn. 86, 132 N.W.2d 711, 719 (1965).

²³ G. Beck, M. Gossman & L. Nehl-Trueeman, *Minnesota Administrative Procedure*, § 9.2 at 146 (1998).

hearing in this matter.²⁴ Furthermore, the tribunal normally has discretion to craft an order necessary to prevent abuse of the process while still allowing discovery.²⁵

3. Primary Issues Raised by the Parties

As noted more fully under Subheading 4 below, the specific discovery requests that are in dispute seek, among other things, information concerning Minnesota residents who have subscribed to the CBN Newsletter in the past or who currently subscribe, and numerous documents and other information relating to those current or former subscribers. In the introductory paragraphs to the Respondents' specific responses to the Department's interrogatories and document requests, the Respondents objected to the Department's discovery requests to the extent such inquiries request data that are protected by the attorney-client privilege, the attorney work product privilege, medical records privileges and "any and all privileges associated with state and federal freedoms of religion and association or other privileges."²⁶ The Respondents also objected to the interrogatories on the ground that "the information requested is private and confidential to the Respondents."

In their written submissions in opposition to the Motion to Compel, the Respondents discussed the issues by the type of information sought and the objection thereto rather than discussing each specific discovery request. Based upon the briefs submitted by both parties, it is evident that they disagree on several major points having to do with the relevancy of the information requested and whether the information and documents encompassed by the requests are privileged and/or subject to constitutional protection. These major points will be discussed below, followed by a discussion of each specific discovery request that is in dispute.

A. First Amendment and Relevancy Issues Associated with Disclosure of Subscriber Identities

The Respondents contend that disclosure of the identities of subscribers and their personal information would constitute an unwarranted infringement of the religious and associational rights guaranteed by the First and Fourteenth Amendments to the U.S. Constitution. The Respondents' objections merit careful consideration.²⁷

The First and Fourteenth Amendments protect free exercise of religion and freedom of association from encroachment by the states.²⁸ Because compelled

²⁴ 2 D. Herr & R. Haydock, *Minnesota Practice* 9 (2d Ed. 1985), citing *Detweiler Brothers v. John Graham & Co.*, 412 F. Supp. 416, 422 (E.D. Wash. 1976), and *County of Ramsey v. S.M.F.*, 298 N.W.2d 40 (Minn. 1980).

²⁵ *Thermorama, Inc. v. Shiller*, 135 N.W.2d 43, 46 (Minn. 1965); see also Minn.R.Civ.P. 26.03.

²⁶ The Respondents did not rely upon the attorney-client or work product privileges in their brief in opposition to the Department's motion.

²⁷ The Respondents assert, and the Administrative Law Judge agrees, that they have not waived the First Amendment rights of their subscribers by identifying some subscribers as witnesses.

²⁸ *Sates v. City of Little Rock*, 361 U.S. 816, 922-23 (1960); *Baldwin v. Commissioner of Internal Revenue*, 648 F.2d 483, 487 (8th Cir. 1981). The "liberty" assured by the due process clause of the

disclosure of a person's membership in groups that are engaged in the advocacy of ideas may have a chilling effect upon that person's freedom of association, the courts have recognized that a "vital relationship" exists between the "freedom to associate and privacy in one's associations" and that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."²⁹ Accordingly, it has been held that membership lists are entitled to protection under the First Amendment.³⁰ Moreover, it is well established that associational privacy is not limited to situations in which an individual associates with groups that espouse unorthodox or unpopular beliefs.³¹

The right to associational freedom and privacy is not absolute, however, and must yield to a compelling state interest.³² A mere showing of some legitimate governmental interest or a mere suspicion that a law has been violated is not enough;³³ to establish a compelling interest, the state must show that the disclosure sought bears a substantial relation to the state's interests and represents the least restrictive means for accomplishing the state's objectives.³⁴ The government's interest in disclosure must also be weighed against the likelihood of injury to the association or its members if the requested information is released.³⁵

In *United States v. Citizens State Bank*,³⁶ the U.S. Court of Appeals for the Eighth Circuit set forth the method of analysis that must be employed in evaluating a claim that First Amendment protections preclude disclosure of information sought by the government in discovery. In that case, the Eighth Circuit held that the appellants had met their initial burden of making a prima facie showing of arguable First Amendment infringement by submitting three declarations by members of the United States Taxpayers Union ("USTU") detailing the adverse effects of an IRS investigative summons on the USTU's organizational and fundraising activities. According to the Eighth Circuit, after the prima facie showing was made by the appellants, the burden shifted to the government to make the appropriate showing of need for the material by demonstrating that "there is a rational connection between such disclosure and a legitimate governmental end, and that the governmental interest in the disclosure is

Fourteenth Amendment encompasses freedom of speech as well as "freedom to engage in association for the advancement of beliefs and ideas." *NAACP v. State of Alabama*, 357 U.S. 449, 460 (1958).

²⁹ *NAACP v. State of Alabama*, 357 U.S. at 462.

³⁰ *Id.*; see also *Buckley v. Valeo*, 424 U.S. 1 (1975); *Pollard v. Roberts*, 283 F.Supp. 248 (E.D.Ark), *aff'd*, 393 U.S. 14 (1968); *United States v. Citizens State Bank*, 612 F.2d 1091 (8th Cir. 1980).

³¹ *Gibson v. Florida Legislative Commission*, 372 U.S. 539, 556 (1963) ("all legitimate organizations are the beneficiaries of [privacy of association] protections"); *Shelton v. Tucker*, 364 U.S. 479 (1960) (public teachers association is entitled to protection).

³² *NAACP v. Alabama*, 357 U.S. at 464.

³³ *Adolph Coors C. v. Wallace*, 570 F. Supp. 202, 209 (N.D. Cal. 1983); *Buckley v. Valeo*, *supra*; *Pollard v. Roberts*, *supra*.

³⁴ *NAACP v. Alabama*, 357 U.S. at 464; *Adolph Coors v. Wallace*, 570 F. Supp. at 208.

³⁵ *Id.*; see also *In re Agerter*, 353 N.W.2d 908, 913 (Minn. 1984).

³⁶ *Id.*

cogent and compelling.”³⁷ The case was remanded to the district court to consider whether the compelled disclosure of all of the records sought by the government would have an adverse effect on the appellants’ freedom of association and, if so, whether the government could make the requisite showing of a compelling need for the material.

The first matter that must be considered in the present case is whether the Respondents have made a prima facie showing of arguable First Amendment infringement. The only supporting information provided by the Respondents in this regard is contained in the Affidavit of Reverend Howard Russell. In his affidavit, Reverend Russell indicates that he has been a member of the Board of Trustees of the Barberton Rescue Mission, Inc., d/b/a “The Christian Brotherhood Newsletter” since November 1999 and was subsequently elected Chairman of the Board and Executive Director. His affidavit states:

As a Pastor of the Christian faith, I feel that it is my ethical duty and obligation to respect the privacy of the individuals who choose to become members of this religious-based ministry and charitable organization. I believe that there generally exists amongst the members of CBN a general expectation of privacy with regard to the religious beliefs of those members, to the effect that I believe that I would be breaching my pastoral duties were I to divulge, without permission, the names of the members to any government agency. I also believe that, if CBN were to either, voluntarily or involuntarily, release the names of its subscribers to a government organization, the potential exists for the members of CBN to lose confidence and trust in this ministry and, therefore, to leave the organization.³⁸

The Department argues that the affidavit supplied by the Respondents does not satisfy their burden of making a prima facie showing that the forced disclosure of the identities of their members will result in harassment of current members, a decline in new members, or other chilling of associational rights, restriction on religious activities, or burdening of the free exercise of religion by their members. For example, the Department points out that the U.S. Supreme Court found in *NAACP v. Alabama* that the NAACP had made the required showing by demonstrating that past disclosure of members’ identities had exposed them to economic reprisal, loss of employment, threats of physical coercion, and other manifestations of public hostility. The Department further contends that evidence of the impact on First Amendment freedoms must be objective in nature, not subjective.

The Administrative Law Judge agrees with the Department’s contention that the mere subjective speculation contained in Reverend Russell’s affidavit falls short of making a prima facie showing that compelled disclosure of subscriber identities will infringe on the First Amendment rights of subscribers. Applicable case law suggests

³⁷ *Id.* at 1094, quoting *Pollard v. Roberts*, 283 F. Supp. at 256-57; *Baldwin v. Commissioner of Internal Revenue*, 648 F.2d at 487..

³⁸ Affidavit of Rev. Howard Russell at ¶2.

that something more than the vague conjecture of the Executive Director of the organization is required to make a prima facie showing of First Amendment infringement. Although it not necessary for the party objecting to discovery on First Amendment grounds to establish a “chilling effect” with certainty, the party does need to show some probability that harassment or a chilling effect might follow from the disclosure. The Respondents here have not shown that it is likely that subscribers to the Newsletter would receive substantial criticism or adverse publicity should their identities be made known or that it is likely that they would cease participation in the program should they be contacted by the Department in an attempt to ascertain what representations were made to them and how the CBN program operates.

Even if it is assumed, arguendo, that the Respondents made a prima facie showing of First Amendment infringement, the Department has shown that there is a “rational connection between such disclosure and a legitimate governmental end, and that the governmental interest in the disclosure is cogent and compelling,” within the meaning of *United States v. Citizens State Bank*.³⁹ The courts have recognized that insurance is “vitally affected with the public interest,”⁴⁰ and the regulation of the rates and conduct of those engaged in that business falls within the police power of the state.⁴¹ To that end, licenses and certificates of authority are required to transact insurance business in Minnesota. It is evident from an examination of Chapter 60A of the Minnesota Statutes (relating to general insurance powers) that Minnesota insurance laws have several important purposes, such as regulating the contents, interpretation, or cancellation of various types of insurance contracts, ensuring that foreign and domestic insurance companies are “being operated in a safe and sound manner” so as “to protect the public interest,” and permitting the Commissioner of Commerce to suspend or revoke a certificate of authority or order imposition of a civil penalty if specified problems are found to exist.⁴²

The nature of the interest of the Department of Commerce in the present case is analogous to the interest asserted by the Department of Commerce in a prior case involving allegations of violations of Minnesota laws relating to the sale of securities. In *In the Matter of Caucus Distributors, Inc.*,⁴³ the Department of Commerce charged Caucus Distributors and other organizations linked to the Lyndon LaRouche campaign with violations of Minnesota statutes governing the sale of securities. The Department alleged that the respondents in that case had sold unregistered securities without a license and acted in a fraudulent, deceptive or misleading manner in connection with

³⁹ 612 F.2d 1091, 1094 (8th Cir. 1980).

⁴⁰ See, e.g., *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944); *Donarski v. Lardy*, 251 Minn. 358, 88 N.W.2d 7 (1958); *Itasca Paper Co. v. Niagara Fire Insurance Co.*, 175 Minn. 73, 220 N.W. 425 (1928).

⁴¹ See, e.g., *O’Gorman & Young v. Hartford Fire Insurance Co.*, 282 U.S. 251 (1931); *German Alliance Insurance Co. v. Lewis*, 233 U.S. 389 (1914); *Shank v. Fidelity Mutual Life Insurance Co.*, 221 Minn. 124, 21 N.W.2d 235 (1945).

⁴² The fact that five other states have also issued cease and desist or similar orders to the Respondents based upon concern that they are engaging in the business of insurance without proper authorization or licensure provides further support for the argument that the State of Minnesota is not looking into the Respondents’ operations based solely on whim or a mere suspicion.

⁴³ OAH Docket No. 8-1005-698-2 (Discovery Order 1986).

those sales. The Department sought discovery of the names and addresses of Minnesota residents to whom offers or sales of promissory notes or other securities had been made, documents relating to those loans, and the names of the shareholders. The respondents argued that the discovery was protected under the First Amendment and no order requiring disclosure should be issued, and the Department moved to compel a response to its discovery.

Administrative Law Judge Jon Lunde determined in *Caucus Distributors* that, although the First Amendment privacy rights of the respondents and their members and supporters may be burdened by the disclosure that was sought, the state's interest in obtaining disclosure outweighed those privacy interests.⁴⁴ Judge Lunde emphasized that the purpose of the state's securities laws was to regulate the merits of securities offered for sale in the state, assure confidence in those securities, prevent deception, and protect Minnesota citizens from "get-rich-quick" schemes calculated to relieve them of their savings. After considering the requirement that the discovery be the narrowest inquiry necessary to accommodate the state's interest, Judge Lunde ordered that the respondents provide a list of all the persons who had made loans other than officers, directors, employees, independent contractors, members, or volunteer workers (unless the total number was under 25 persons for any of the respondents) or, in the alternative, that the respondents provide the Judge with a list of all of the persons who made loans and allow the Judge to provide the Department with the names of 30 persons chosen at random from each list. Judge Lunde also ordered that the information be provided subject to a protective order that ensured the confidentiality of the information and required the return of all of the information after a final decision was reached. After the respondents did not comply with either option, the Judge entered an order precluding them from contesting portions of the Department's cease and desist order.

On appeal, the Court of Appeals affirmed the finding of Judge Lunde and the Commissioner of Commerce that the "governmental interest [in regulating securities] was sufficiently compelling to outweigh the claimed infringement by relators on their right of association with their contributors."⁴⁵ The Court of Appeals noted that, "[T]he bare claim of a first amendment interest does not insulate behavior from responsible judicial scrutiny. The state has an interest in protecting citizens from abusive practices in solicitation of funds for charity, even when the charitable organization has a purpose protected by the first amendment."⁴⁶ The sanction imposed by Judge Lunde for failure to comply with the discovery order was also upheld.

Moreover, in *Local 1814 v. Waterfront Commission of New York Harbor*,⁴⁷ the Waterfront Commission was investigating claims that certain members of a union had been coerced into making donations to the union's political action committee. The

⁴⁴ *In the Matter of Caucus Distributors, Inc.*, OAH Docket No. 8-1005-698-2 (Discovery Order 1986), *aff'd sub nom. Caucus Distributors v. Commissioner of Commerce*, 422 N.W.2d 264, 268 (Minn. App. 1988), *rev. denied* (Minn. 1988), *cert. denied*, 109 S.Ct. 786 (1988).

⁴⁵ *Caucus Distributors v. Commissioner of Commerce*, 422 N.W.2d 264, 268 (Minn. App. 1988), *rev. denied* (Minn. 1988), *cert. denied*, 109 S.Ct. 786 (1988).

⁴⁶ *Id.* at 273.

⁴⁷ 667 F.2d 267 (2d Cir. 1981).

Waterfront Commission sought to obtain the names of employees who had recently authorized payroll deductions. The U.S. Court of Appeals for the Second Circuit determined that the Commission's interest in fighting crime on the waterfront and preventing the extraction of money by coercive means was a compelling interest. In the view of the Administrative Law Judge, the Department's interest in regulating the transaction of insurance in Minnesota in the present case is no less compelling than the Waterfront Commission's interest in the *Local 1814* case or the Department of Commerce's interest in the *Caucus Distributors* case.

Since the State has a compelling interest in regulating insurance, it must be determined whether the precise information sought by the Department in the present case is relevant to the subject matter of this action. If it is, the rights and interests of the parties must be balanced to determine whether the public interest outweighs the First Amendment rights of the Respondents' subscribers and whether the discovery requests are framed in the least intrusive manner possible.

The Respondents contend that the Department's discovery requests seeking information relating to particular subscribers are overbroad and irrelevant because the information sought would shed no light on the sole issue in this case: whether the structure and nature of the Newsletter makes it susceptible to regulation as "insurance" under the definition of insurance contained in Minn. Stat. § 60A.02, subd. 3. That section provides that "insurance" is "any agreement whereby one party, for a consideration, undertakes to indemnify another to a specified amount against loss or damage from specified causes, or to do some act of value to the assured in case of such loss or damage." The Respondents claim that the only issues under the statutory definition of "insurance" are where there is an agreement, whether the nature of the agreement is a binding undertaking to indemnify of the type that the courts recognize as insurance and, if so, whether there was a binding undertaking to indemnify to "a specified amount against loss or damage from specified causes" within the meaning of Minn. Stat. § 60A.02, subd. 3. The Respondents contend that the Department does not need to know the identity of subscribers or have information about a subscriber's medical information, standing as a church member, or what happened in any individual instance of purported indemnification to determine the nature of the agreements among CBN and its subscribers. They therefore urge that the Department's Motion to Compel be denied to the extent that it seeks such information.

Although the Respondents acknowledge that CBN's current management does not have access to all of the organization's historical records, they assert that they have, in fact, produced documents showing the nature of their relationship with subscribers. They allege that the Department can tell how the program works from the redacted forms contained in Exhibit D to the Pursell Affidavit. Although the Respondents admit that portions of the applications and renewal forms may be relevant to the extent that they shed light on any underlying agreements, they contend that producing more than sample copies of the forms would be cumulative. The Respondents indicated that only a limited number of forms have been used over time, most of which are in Ex. C to the Pursell Affidavit and the rest of which will be produced by Respondents in redacted

form. To produce copies of each form for each subscriber would, according to the Respondents, not only compromise their identities but also place an unreasonable burden on Respondents to produce purely cumulative evidence.

The Respondents admit that the Newsletter has Minnesota members and indicate that they will not deny the identity or authenticity of their program materials. The Respondents assert that, because the definition of insurance is not subjective, the subjective understanding of the arrangement by individual subscribers cannot vary the terms of the relationships and agreements. For example, the Respondents contend that no subscriber who had received a "Fact Pak," or signed a renewal form specifically acknowledging that the Newsletter was not "insurance" could credibly testify that he or she thought the Newsletter had the regulatory protections afforded insurance products. The Respondents contend that the Department has not made any allegations of misrepresentation, unfair claims practices, deceptive sales tactics, or anything requiring examination of individual claim files. Moreover, the Respondents further indicated that they have identified some Minnesota subscribers because those particular subscribers have been willing to allow themselves to be identified.

In response, the Department asserts that the identity of Minnesota residents who are subscribers of the Respondents is directly relevant to its claim that the Respondents are entering into contracts of insurance with Minnesota residents. It argues that the identity of Minnesota residents who have contracted with the Respondents and have paid money to and received money from the Respondents is appropriate for discovery in this matter because these people are material witnesses to the fact that the Respondents are engaging in the business of insurance. The Department asserts that these individuals can identify information they received from the Respondents and their understanding of the programs offered by the Respondents, and thus are in the best position to testify as to what they were told or led to believe. The Department further contends that would be improper to permit the Respondents to identify several Minnesota subscribers they intend to use as witnesses but withhold from the Department the identities of the rest of the subscribers, who may be potential witnesses for the Department. Finally, the Department point out that the Respondents' failure to release subscriber information has rendered it unable to investigate to determine if there have been any misrepresentations, unfair trade practices, unfair claims practices, or other misconduct toward individuals.

After careful consideration of the parties' competing arguments, the Administrative Law Judge finds as a general matter that the Department's discovery requests seeking information relating to subscriber identification, payment history, and other information concerning the scope of the Respondents' insurance business in Minnesota are relevant in that the information sought concerns the subject matter involved in this action and relates to a claim or defense of a party. As discussed in more detail below in connection with the specific discovery requests, certain of the information encompassed within the Department's discovery requests (such as medical records received from providers and verification of Christian faith/eligibility forms) is not deemed relevant or proper for disclosure, and disclosure of such information will not be

compelled. The Administrative Law Judge concludes that the Department is, however, entitled to learn the identity of Minnesotans who have contracted with the Respondents, paid money to them, and received money from them.

The Minnesota Supreme Court has emphasized that “[g]eneral contract principles govern the construction of insurance policies and insurance policies are interpreted to give effect to the intent of the parties.”⁴⁸ Moreover, it is well established that “[t]he nature of a contract as one of insurance depends upon its contents and the true character of the contract actually entered into or issued—that is, whether a contract is one of insurance is to be determined by a consideration of the real character of the promise or of the act to be performed, and by a consideration of the exact nature of the agreement in the light of the occurrence, contingency, or circumstances under which the performance becomes requisite, and not by what it is called.”⁴⁹ In considering a separate matter involving the Respondents, the Iowa Supreme Court has stated that it is necessary to “look through the form of the transaction to determine whether the relationship of insurer and insured exists” and emphasized that whether a contract constitutes an insurance contract “must be determined from its purpose, effect, content, terminology, and conduct of the parties, and not from its designation therein, since a contract which is fundamentally one of insurance cannot be altered by the use or absence of words in the contract itself. The court must look also to the intention of the parties in making this determination.”⁵⁰

Thus, the Administrative Law Judge is persuaded that the Department is seeking highly relevant information when it seeks disclosure of the identities of subscribers and detailed information about the manner in which their medical expenses were paid. These current and former CBN subscribers are material witnesses with respect to the Department’s claim in this case that the Respondents are engaging in the business of insurance. They can identify the information they received from the Respondents, discuss what they were told by the Respondents’ employees, provide their understanding of programs offered by the Respondents, and describe how the Respondents’ program operates.⁵¹ It is particularly appropriate and necessary to permit the Department to have access to subscribers since the Respondents admittedly do not have all of the historical documents at their disposal and have not even divulged a complete list of employees, officers, and directors or complete copies of their Newsletters, marketing materials, and insurance policies. Unless the Respondents gain access to the information that they allege is missing and may have been taken by ousted CBN managers, it appears that discovery involving current and former

⁴⁸ *Kersten v. Minnesota Mutual Life Insurance Co.*, 608 N.W.2d 869, 873 (Minn. 2000).

⁴⁹ 43 Am. Jur. 2d *Insurance* §4, at 79-80 (1982), quoted with approval in *Barberton Rescue Mission, Inc. v. Insurance Division of the Iowa Department of Commerce*, 586 N.W.2d 352, 354 (Iowa 1998).

⁵⁰ *Id.* at 354-55, quoting 12 Appleman, *Insurance Law and Practice* § 7001 at 2.

⁵¹ The Respondents acknowledge in their brief in opposition to the Motion to Compel that the determination of whether an arrangement constitutes “insurance” “depends on the nature of the transaction and the structure of the relationships and agreements between the parties.” Memorandum in Opposition at 10. In the view of the Administrative Law Judge, it may be necessary for the Department to know the names of subscribers and the detailed workings of the program to explore the structure of the relationships and agreements between the parties.

subscribers may be the most reliable way that the Department may learn of certain marketing techniques, CBN responses to subscriber inquiries, and other information concerning the nature of CBN's program. This discovery will enable the Department to gain a full understanding of how the Respondents' program works and evaluate their theory that the program fits the definition of "insurance" under Minn. Stat. § 60A.02, subd. 3.

Discovery of the manner in which the Respondents' program works goes to the heart of the Department's case. In order to evaluate whether the CBN program in fact involves the transaction of insurance, the Department must, at a minimum, know what representations were made by the Respondents to potential and actual subscribers about the nature, purpose, and operation of the program, what amounts of medical losses were reimbursed through the program, the reasons why certain losses were not reimbursed, and other details of the operation of the program. All of the circumstances must be considered to determine if the Respondents are engaged in the transaction of the insurance business. All of these factors are highly relevant and crucial to the State's case.

The Judge therefore is persuaded that the Department has demonstrated a compelling need to obtain the names, addresses, payment data, and other information relating to persons in Minnesota who have subscribed to the CBN Newsletter during the relevant period of time of January 1997 to April 30, 2002⁵² and that the Department's interest in obtaining disclosure outweighs any First Amendment interests of the Respondents' subscribers, except with respect to the Christian faith verification form. If the Department were unable to obtain the requested information, its ability to regulate insurance offered by religious organizations would be severely affected and it would be likely in the present case that its charges would have to be dismissed. The Department's discovery requests, as limited below, are found to be the least inclusive and most narrow inquiry necessary to accommodate the State's interest.⁵³

B. Medical Records

The Respondents have stressed that the Department's request for "all documents" relating to Minnesota residents encompasses doctor and pharmacy bills and other documents that disclose individual diagnosis and treatment information and asserts that such documents are privileged and should not be required to be disclosed. The Respondents argued in their initial discovery response that subscriber medical records are privileged under Minn. Stat. § 144.335, subd. 2(a). In their Memorandum in Opposition to the Motion to Compel, the Respondents rely on Minn. Stat. § 144.335, subd. 3a (a), as support for their claim that the medical records are privileged. Under that statute, "[a] provider, or a person who receives health records from a provider, may not release a patient's health records to a person without a signed and dated consent

⁵² This was the relevant time period as defined in the introductory paragraphs to the Department's discovery requests. The Respondents have not raised any objection to this time period.

⁵³ See *Savola v. Webster*, 644 F.2d 743 (8th Cir. 1981); *Adolph Coors Co. v. Wallace*, 570 F.Supp. 202 (N.D. Cal. 1983).

from the patient or the patient's legally authorized representative authorizing the release, unless the release is specifically authorized by law."⁵⁴ A person who negligently or intentionally releases a health record in violation of the statute and without the patient's consent is liable for compensatory damages caused by an unauthorized release, costs and attorneys' fees under subdivision 3a(e) of the same statute, or potentially may be liable under the newly-recognized tort of invasion of privacy. The Respondents contend that the CBN obtains some records from subscribers and others from subscribers' providers, and does not have a release or other authority to release such records to others such as the Department. The Respondents also point out that subdivision 3a(a) does not expressly say that the person must have received the health records *directly* from a provider to fall within the reach of the statute and contend that protection should be afforded documents that were prepared by a provider but submitted to the Respondents by others. The Respondents urge that the Department's request for this "highly confidential and wholly irrelevant personal health record information" be denied. In response, the Department argues that the Respondents' reliance on the "medical record privilege" lacks any support in the law or in the facts of this case and contends that disclosure of medical records should be compelled.

The Department correctly asserts that the provision initially cited by the Respondents (Minn. Stat. § 144.335, subd. 2(a)) does not apply here because that statute simply specifies that patients may access their own health records and does not address any medical record privilege. Based upon the plain language of Minn. Stat. § 144.335, subd. 3a (a), it is clear that it merely provides support for the existence of a privilege for medical records that were, in fact, given to the Respondents by "providers."⁵⁵ The Department alleges, contrary to the Respondents' assertions, that the Respondents only receive records directly from their subscribers, not from a provider. If the sample redacted subscriber files provided by the Respondents in conjunction with this motion⁵⁶ are representative, it appears that it is likely that most health records are provided to the Respondents by the subscriber himself or herself and thus will not be shielded by the privilege set forth in section 144.335, subd. 3a (a).

Accordingly, it is concluded that the only medical records that are privileged in the hands of the Respondents and may be withheld by them during discovery are records that were submitted to the Respondents by providers. Medical records supplied by subscribers are not privileged.⁵⁷

⁵⁴ Emphasis added.

⁵⁵ The term "provider" is defined in Minn. Stat. § 144.335, subd. 1, to mean "(1) any person who furnishes health care services and is regulated to furnish the services" pursuant to certain chapters of Minnesota statutes and rules; (2) a licensed home care provider; (3) a licensed health care facility; (4) a registered physician assistant; and (5) an unlicensed mental health practitioner.

⁵⁶ See Pursell Affidavit, Ex. D.

⁵⁷ Because the Respondents are not the persons to whom the patient/subscriber's confidence was extended (that is, the Respondents are not physicians or agents of physicians), the physician-patient privilege set forth in Minn. Stat. § 595.02, subd. 1(d), does not apply in the context of this case. Even if the privilege were construed to apply, it is evident that it was waived when the subscribers provided the medical records to third parties such as the Respondents. See, e.g., *State v. Sam*, 2001 WL 641522 at *4 (Minn. Ct. App. June 12, 2001); *State v. Staat*, 192 N.W.2d 192, 196-97 (Minn. 1971).

C. Clergy Privilege

In their initial responses to discovery, the Respondents relied in part upon the clergy privilege recognized in both Minnesota and Ohio law as a basis for withholding documents. The Respondents did not make any arguments in their Memorandum in Opposition to the Motion to Compel in support of their reliance on the clergy privilege.

Any privilege provided by Ohio law is, of course, not binding in a Minnesota case. Moreover, as the Department emphasizes, the clergy privilege provided by Minnesota law applies only to communications made to a minister by a person “seeking religious or spiritual advice, aid, or comfort.”⁵⁸ Under relevant case law, assertion of the clergy privilege requires a showing that “the potential witness is a religious minister” and the person making the communication “intended the conversation to be private and was seeking religious or spiritual help.”⁵⁹

Because the various interrogatories and document requests to which the Respondents object do not in any way seek disclosure of confidential communications that occurred between subscribers and a member of the clergy for the purpose of seeking religious or spiritual advice, aid, or comfort, the information is not protected by the clergy privilege. There can be no colorable claim that the documents submitted by subscribers to have their medical “needs” considered for “publication,” the applications of subscribers or the information contained on the verification of Christian faith/eligibility form constitute communications for the purpose of seeking ‘religious or spiritual advice, aid, or comfort.’ In addition, since the communication on the verification of Christian faith/eligibility form is sent by a “pastor/church official” to “CBN,” there is no confidential communication between a member of the clergy and the subscriber. Thus, the clergy privilege does not properly apply in the present case.

4. Specific Discovery Requests in Dispute

Interrogatory No. 1

In interrogatory No. 1, the Department asks the Respondents to “identify all Minnesota residents to whom you have sent any marketing or sales information, solicitation, agreement, Fact Pak, or any other information relating to The Barberton Rescue Mission, Inc., Christian Brotherhood Newsletter, a/k/a CBN, and Christian Brotherhood Newsletter, Inc., a/k/a CBN, Inc.” In their initial response to the discovery request, the Respondents objected to the interrogatory on the ground that the information requested was not reasonably calculated to lead to the discovery of evidence that would be admissible at trial. Without waiving that objection, the Respondents provided a list of “Minnesota Non-Subscriber Residents Who Received Information Packet,” but withheld the names of the “non-subscribers.” The

⁵⁸ Minn. Stat. § 595.02, subd. 1(c); *State v. Orfi*, 511 N.W.2d 464, 467 (Minn. Ct. App. 1994).

⁵⁹ *Id.* at 469; *State v. Lender*, 266 Minn. 561, 564, 124 N.W.2d 355, 358 (1963).

Respondents did not identify any current or former "subscribers" who received information from them.

The Respondents did not provide any argument in their brief in opposition to the Department's Motion to Compel explaining why they withheld the names of "non-subscribers" or asserting any particular privilege or constitutional protection for doing so. The disclosure of the names of those who received information from the Respondents but chose not to subscribe to the CBN Newsletter could lead to the discovery of relevant information concerning the content of the marketing information sent by the Respondents or representations made by the Respondents. This may be particularly important in light of the Respondents' admission that they are having difficulty locating certain materials and believe that the former management of the organization may have removed some information. In addition, as noted above, the Judge has concluded that the Department has a substantial and compelling interest in obtaining the names of current and former subscribers that outweighs any possible First Amendment infringement. Accordingly, the Respondents are ordered to produce information relating to the identities of Minnesota residents—both subscribers and non-subscribers—who were sent marketing materials during the relevant period (defined as January 1, 1997, to April 30, 2002).

Interrogatory Nos. 2-7 and 12-15

In Interrogatory Nos. 2-4, the Department requested that the Respondents identify all Minnesota residents who currently receive or have received the Christian Brotherhood Newsletter or any other publication or solicitation of Respondents and all Minnesota residents who are or were members or subscribers of the Respondents, including the date they became subscribers and whether they terminated their membership or are still subscribers. Interrogatory No. 5 asks that the Respondents identify all Minnesota residents who have donated, given, or paid money to any members or subscribers of the Respondents. Interrogatory Nos. 6 and 7 request that the Respondents identify all Minnesota residents who have submitted an application to become a member or subscriber of the Respondents or to receive the Christian Brotherhood Newsletter, along with the date of the application, whether it was approved or denied, and the reason for any denial. Interrogatories Nos. 12-15 requested that the Respondents identify all Minnesota subscribers of the Respondents who have had a "need" or request for money or assistance published in the Newsletter or any other publication by Respondents, including the dates of such publications and the amount of each "need" or request, and also identify all Minnesota subscribers who have not had a "need" or request for money or assistance published, the dates and amounts of those requests, and the reason for denial or delay.

In their response, the Respondents objected to these interrogatories based on First and Fourteenth Amendment freedom of religion and freedom of association grounds, a similar provision guaranteeing religious freedom contained in Article 1,

Section 16 of the Minnesota Constitution,⁶⁰ and the clergy privilege provided in Minn. Stat. § 595.02, subd. 1(c), and Ohio Stat. § 2317.02(C). As discussed above, it has been concluded that there has been no proper showing that the clergy privilege applies under these circumstances, and the State's interest in regulating the transaction of insurance and discovering the detailed manner in which the Respondents' program operates in order to ascertain whether it amounts to the transaction of insurance outweighs any potential infringement of constitutional rights. Accordingly, the Respondents are ordered to provide complete responses to these interrogatories.

Interrogatory No. 9

Interrogatory No. 9 requested that the Respondents identify all persons that they intended to rely upon to provide factual information in these proceedings or whom the Respondents may call as a witness at the hearing. In response, the Respondents identified nine potential witnesses and also stated that they intended to call "possibly other subscribers who have yet to be determined" and would supplement the answer to this interrogatory as necessary. The Department indicated in its Motion to Compel that it would object to the Respondents' use of any testimony by or documents of "subscriber" witnesses not identified in response to this interrogatory since the Department contends that those persons are clearly known at this time to Respondents and their names are being withheld without justification.⁶¹

The Respondents are ordered to supplement their response to Interrogatory No. 9 to the extent they are now aware of other witnesses or persons upon whom they intend to rely to provide factual information. The Respondents shall amend their response in the future as more information becomes available.

Interrogatory No. 10

In Interrogatory No. 10, the Department asked that the Respondents identify all persons with knowledge of the facts or violations alleged in the Notice of Hearing. In response, the Respondents referred to three employees identified in response to Interrogatory No. 8, the "subscribers" identified in response to Interrogatory No. 9, and counsel of record, and indicated that "no others are known at this time." Once again, the Respondents indicated that the response would be amended and supplemented

⁶⁰ Article I, Section 16 of the Minnesota Constitution provides in pertinent part: "The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

⁶¹ The Department also argues that the Respondents have waived their objections to identifying their "subscribers" by identifying some of them. Because constitutional rights are held by individuals, and not by the Respondents on their behalf, the Administrative Law Judge does not agree that the Respondents are able to waive the rights of its subscribers.

once additional information had been acquired. In its Motion to Compel, the Department objects to the Respondents' failure to provide any explanation or objection justifying the failure to identify additional "subscribers" and questioned the Respondents' failure to identify current or former employees or board members as persons with knowledge of the facts alleged in this case, such as their President, Bruce Hawthorn, and their Vice President, Ronald Beers. The Department again indicated that it would object to the use of any testimony by or documents of those unidentified "subscribers."

The Respondents are ordered to supplement this response to the extent that they are now aware of other individuals with such knowledge, including pertinent officers, directors, or board members. The Respondents shall amend their response in the future as more information becomes available.

Interrogatory No. 11

In interrogatory No. 11, the Department requested that the Respondents identify all employees, agents, or other persons working on their behalf who have sent any marketing or other information relating to the Respondents to any Minnesota resident. In response, the Respondents indicated that they were continuing to make attempts to acquire the records of previous individuals who were employed prior to the appointment of the Operating Receiver on April 25th, 2001. The Respondents stated that "[m]any individuals at The Christian Brotherhood Newsletter would have had the ability to, and may have been assigned from time to time, the task of mailing brochures to Minnesota residents. In effect, every employee who was employed by the Christian Brotherhood Newsletter from 1997 to the present could, in all likelihood, have mailed in information packet." The Respondents indicated that they were attempting to compile a comprehensive list of employees who had been employed by The Christian Brotherhood Newsletter from 1997 to the present, and they intended to supplement their response once the list had been compiled. The Respondents indicated that, despite all due diligence and efforts, the list could not be compiled at the present time because the records were not available and either were removed or destroyed prior to the appointment of the Operating Receiver on April 25, 2001.

In its Motion to Compel, the Department argues that the Respondents clearly would be able to identify at least some of the employees at the present time but failed to name even a single person in their response. Although the Department requested in its May 13, 2002, letter that the Respondents immediately produce a list of employees known to them at that time and supplement that list as necessary, the Respondents have not provided additional names in response to this letter.

The Respondents are hereby ordered to supplement their response to Interrogatory No. 11 by identifying all employees, agents, and others working on their behalf during the relevant time period who are known to them at the present time, even if that list is not yet complete. The Respondents shall serve additional supplemental responses in the future as more information becomes available.

Interrogatory Nos. 16-18

In Interrogatory No. 16, the Department sought to have the Respondents describe payments made to any Minnesota members or subscribers who had a "medical need" or request for money or assistance published in their publications, including the names of the Minnesota subscribers, the dates of publication, the amounts of their "needs" or requests, the dates and amounts of each payment, the identity of the party from whom the payment came, and the total amount of payments. In Interrogatory No. 17, the Department sought to have the Respondents describe each payment by any Minnesota members or subscribers to other members or subscribers who had a "medical need" or request for money or assistance published by the Respondents, including the name of the Minnesota subscriber who made the payment, the date and amount of each payment, and the total amount paid. In Interrogatory No. 18, the Department requested that the Respondents describe each payment by any Minnesota members or subscribers directly to the Respondents, including the name of the subscriber, the dates and amounts of the payments, and reason for each such payment. In response, the Respondents restated their objections based upon the First and Fourteenth Amendment and the clergy privilege. The Respondents provided a document entitled "Minnesota Active and 'Termed' Subscribers" in response to Interrogatory No. 16. The document was redacted to avoid disclosure of the identity of individual subscribers.

In its Motion to Compel, the Department contends that the Respondents have no basis upon which to withhold the identity of their subscribers as requested by the Department. The Department also contends that the Respondents have failed to provide other information requested by the Department in those interrogatories without providing any explanation or asserting any objection. For example, the Respondents failed to provide the dates of publication of medical needs or requests, the dates and amounts of payments made, and the identity of the party who made the payment in accordance with Interrogatory No. 16; the date and amount of each payment and the total amount paid by the subscriber, in accordance with Interrogatory No. 17; or the date of, amount of, and reason for each payment by the Minnesota subscriber in accordance with Interrogatory No. 18.

As discussed above, the payment information is highly relevant to the subject matter of this contested case proceeding. In order to assess whether the Respondents' program operates as insurance, it is necessary to gain information regarding the manner in which the Respondents' program operates and medical "needs" are paid. The clergy privilege has no application here, and the Department has demonstrated a compelling interest in the information sought that outweighs any possible First Amendment infringement. The Respondents are ordered to provide a full and complete response to these interrogatories.

Interrogatory No. 19

In Interrogatory No. 19, the Department seeks to have the Respondents describe the current amount of any "medical needs" submitted by their members or subscribers for payment which have not been paid for any reason, including the name of subscribers whose needs have not been paid, the date of their request, the reason why their needs have not been paid, the amount of their need, and the total amount of all unpaid needs. In response, the Respondents restated their objections based upon the First and Fourteenth Amendments and the clergy privilege. The Respondents also provided a document entitled "Current Outstanding Medical Needs for ALL Subscribers of CBN." The Department asserts in its Motion to Compel that, in addition to withholding the names of their subscribers, the Respondents failed to provide the dates of the requests, the reasons why the subscriber's need was not paid, and the amount of the subscriber's need without explanation or objection.

Again, the clergy privilege is not applicable, the information sought is highly relevant to the subject matter of this case, and the Department has demonstrated a compelling interest in obtaining this information that outweighs any possible infringement upon constitutional rights. The Department is ordered to provide a full and complete response to Interrogatory No. 19.

Interrogatory No. 20

In Interrogatory No. 20, the Department sought to have the Respondents describe all insurance policies which provide any type of coverage for the Respondents including but not limited to liability coverage. The Respondents indicated in their interrogatory responses that "all such policies have been set forth in the Document Production Response." However, the Respondents provided copies of only two insurance policies in connection with their document production. One was in effect from January 10, 2001, to January 10, 2002, and the other was in effect for the period from October 6, 1999, to October 6, 2002. In its Motion to Compel, the Department points out that the relevant time period was defined in the preface to the interrogatories as being January of 1997 through the date of signing the answers. The Department requested in its Motion to Compel that additional policies be provided encompassing the relevant time period. In their brief in opposition to the Motion, the Respondents indicated that they "will produce additional insurance policies . . . as they become available."⁶²

The Respondents are ordered to supplement their responses to Interrogatory No. 20 to the extent that they now have insurance information and/or copies of additional policies that were in effect during the relevant time period.

Document Request Nos. 1-3, 6-8, 11, and 13

In Document Request Nos. 1-3, the Department requested that the Respondents produce all documents identified, relied upon, or relating to any of the Department's interrogatories or the Respondents' responses to those interrogatories; all documents relating to any Minnesota residents who are or were members or subscribers of the

⁶² Memorandum in Opposition at 8.

Respondents; and all documents relating to any Minnesota resident who has made or received any payments to or from any other member or subscriber or to or from Respondents directly. In Document Request Nos. 6-8, the Department requested production of all documents related to any payments made by Minnesota members or subscribers of the Respondents, including those made to another member or subscriber who had a "medical need" or request for money or assistance published by the Respondents; and all documents relating to any payments to any Minnesota members or subscribers of the Respondents who had a "medical need" or request for money or assistance published in the Respondents' publications. In Document Request No. 11, the Department requested production of all documents relating to any applications for membership submitted by Minnesota residents, and in Document Request No. 13, the Department requested copies of all publications since January 1, 1997, by the Respondents including, but not limited to, the Christian Brotherhood Newsletter.

The Respondents objected to these requests on the grounds that many of the documents were medical records, subject to constitutional protection, or protected under the clergy privilege. The Respondents indicated that they had, however, produced all of the non-privileged documents that were identified in their Responses to Interrogatories. In addition to arguing that the documents were not properly withheld as medical records and were not entitled to protection under the constitution or the clergy privilege, the Department contends that the Respondents simply ignored many of the requests and failed to offer any justification for its failure to comply. For example, the Department indicates that is unclear why the Respondents failed to produce even redacted copies of the Newsletter in response to Document Request No. 13. In their memorandum in opposition to the motion, the Respondents merely indicated that they believe that it would be "cumulative" to provide copies of the Newsletter.

For the reasons discussed above, the Administrative Law Judge has concluded that nearly all of the documents sought by the Department in these document requests are properly discoverable and are not appropriately withheld based upon an assertion of medical record confidentiality, constitutional privilege, or clergy privilege. Application forms and payment and other information relating to Minnesota residents are highly relevant to the subject matter of this proceeding, as discussed previously. Copies of the Newsletter, to the extent available, are also relevant because it is likely that they will contain representations concerning the manner in which the program operates. There are, however, two exceptions. First, as discussed above, medical records that appear among these documents are privileged and may be withheld if they were submitted to the Respondents *by providers*.⁶³ (However, medical records submitted *by subscribers* are not privileged and must be provided to the Department.) Second, the verification of Christian faith/eligibility form that apparently is retained in subscriber files may be withheld. This form reflects the certification of the subscriber's pastor or church official that the subscriber strives to live by Biblical principles, attends church regularly, and

⁶³ It is assumed, based upon the sample subscriber files provided by the Respondents in connection with their Memorandum in Opposition to the Motion, that not many documents will be withheld under this theory. If that assumption is incorrect, the Respondents may wish to attempt to obtain the consent of subscribers to release these documents, or the Department may wish to seek modification of this Order.

totally abstains from alcohol, tobacco, illegal drugs, and a homosexual lifestyle. The form also gives the name of the church to which the subscriber belongs. This is the type of information that should be entitled to protection under the First Amendment unless the State has demonstrated a compelling need. The Department has not shown that the information contained on this form is relevant to this proceeding or demonstrated a compelling need for this information.

Thus, the Respondents may continue to withhold medical records received from providers and the faith verification forms from its responses to the Department's discovery requests. Otherwise, the Respondents are ordered to fully respond to these document requests.

Document Request No. 4

In Document Request No. 4, the Department requested production of all documents provided to employees, agents, or other persons working on behalf of the Respondents who have contacted any Minnesota residents on behalf of the Respondents including, but not limited to, marketing or sales information, solicitations, or agreements. The Respondents indicated in response that no such employees, agents or other persons have contacted Minnesota residents other than the mailing of the newsletter and information packet sent to Minnesota residents upon a direct request from the Minnesota resident. The Respondents did not provide any documents in response to this request.

The Document Request is overbroad as written, since it could be interpreted to documents relating to completely irrelevant subjects such as employee paychecks or memoranda relating to parking or travel policies. Such information is not needed by the Department to properly present its case. However, documents relating to marketing or sales information, solicitations, or agreements that were given to employees, agents, or other persons working on behalf of the Respondents who in turn contacted Minnesota residents and likely relied on such documents are, in fact, relevant. The Respondents thus are ordered to provide copies of any documents relating to marketing or sales information, solicitations, or agreements provided to employees, agents, or other persons working on behalf of the Respondents who have contacted any Minnesota residents on behalf of the Respondents.

Document Request No. 9

In Document Request No. 9, the Department requested production of all documents relating to any surety bonds or insurance policies providing coverage for the Respondents. In response, the Respondents provided copies of the two insurance policies mentioned above with respect to Interrogatory No. 20. In its Motion to Compel, the Department requests that the Respondents be required to provide documents relating to the full time period encompassed by its discovery requests. This issue was discussed above with respect to Interrogatory No. 20. The Respondents are ordered to supplement their response to Document Request No. 9 by providing all available bonds

or policies that were in effect during the relevant period encompassed by the Department's requests.

Document Request No. 10

In the Document Request No. 10, the Department requested production of all documents relating to any unpaid medical needs submitted by a member or subscriber. In response, the Respondents restated the objections set forth above with respect to Document Request No. 1, and provided two documents entitled "Reason Codes for Denial of Medical Need" and "Minnesota Needs Denied."

In its Motion to Compel, the Department argues that the Respondents have no legitimate basis for withholding the identity of their subscribers and points out that the subscriber names apparently have been redacted from the "Minnesota Needs Denied" document. If the names have not, in fact, been redacted from the "Minnesota Needs Denied" document, the Department argues that the Respondents must have documents relating to unpaid needs with the names of subscribers on them and should be compelled to provide these documents.

For the reasons discussed above, the Department has shown that it has a significant and compelling interest in obtaining the specific subscriber and need payment information. Such information is crucial to the Department's case, since it will reflect the manner in which the Respondents' program operates and assist in a determination of whether the program constitutes the transaction of insurance business. Payment information that is not linked to particular subscribers would be of limited utility, since it will not allow the Department to fully assess the details of the program's operation. The Respondents are ordered to fully respond to Document Request No. 10.

Document Request No. 12

In Document Request No. 12, the Department seeks the production of all documents that relate to the facts or violations alleged in the Notice of Hearing or which the Respondents intend to introduce into evidence, rely upon, produce or reference in their dispositive motions or at the hearing in this matter. In response, the Respondents indicated that they were not yet aware of the specific documents upon which they would rely at the hearing but would supplement their response once such a determination had been made. In its Motion to Compel, the Department indicated that it would object to the Respondents' use of any documents at the hearing or in its motions that were in the Respondents' possession at the time of the discovery response but were not disclosed.

The Respondents are ordered to supplement their response to Document Request No. 10 by providing any documents of which they are now aware that relate to the facts or violations alleged in the Notice of Hearing or which they intend to introduce into evidence, rely upon, produce or reference in their dispositive motions or at the hearing in this matter. The Respondents shall amend their response in the future once they have made such a determination.

5. Privilege Log, Protective Order, and Modification to Schedule

The Respondents are ordered to produce the additional discovery responses encompassed by this Order within two weeks (by August 9, 2002). At the same time, they must produce a privilege log for each document withheld. The log must briefly describe the document (including the date, number of pages, name, address, and employment title of author or preparer and the addressee or others receiving a copy), state the subject matter of the document (including identification of meetings or conversations referenced in the document), and specify the reason for withholding the document, including a statement of the basis for the claim of privilege or other ground for non-disclosure. The Department shall be granted an additional thirty days from the date it receives the Respondents' supplemental discovery responses to notice non-expert depositions. Because Administrative Law Judges lack authority to impose monetary sanctions, the Department's request for attorneys' fees and expenses is denied.

Rule 26.03 of the Rules of Civil Procedure specifies that an order may be issued to protect a person or party from annoyance, embarrassment, or oppression, which could possibly follow from the disclosure of information. This rule may be applied in administrative proceedings under Minn. R. 1400.6600 and Minn. Stat. § 14.60, subd. 2. The privacy interests of a party are properly addressed in a Protective Order.⁶⁴ Accordingly, a Protective Order has been issued in this case to avoid the improper dissemination or publication of the identities of persons revealed as a result of this Order or their medical or other confidential records. The parties may seek to modify the Protective Order if desired.

The Respondents are reminded of their duty to supplement their discovery responses in accordance with Rule 26.05 of the Minnesota Rules of Civil Procedure.⁶⁵

B.L.N.

⁶⁴ *Erickson v. MacArthur*, 414 N.W.2d 406, 410 (Minn. 1987); *Caucus Distributors, Inc. v. Commissioner of Commerce*, 422 N.W.2d 264 (Minn. App. 1988), *rev. denied* (Minn. 1988), *cert. denied*, 109 S.Ct. 786 (1988).

⁶⁵ See also *McCarthy Well Co. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312 (Minn. 1987); *Blatz v. Alina Health System*, 622 N.W.2d 376 (Minn. App. 2001); *State v. Heimer*, 393 N.W.2d 687 (Minn. App. 1986).